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82-974

In The

Supreme Court of the United States

OCTOBER TERM, 1982

No. _____

ELMER H. THOMASSEN,
JOAN THOMASSEN,
WILLIAM THOMASSEN,
ROSE HORN, and
GEORGE THOMASSEN,
Petitioners

v.

UNITED STATES OF AMERICA, and
FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT ABUSED ITS DISCRETION IN DISMISSING THE APPEALS BELOW AND THEN IN NOT RECALLING THE MANDATES AND NOT REINSTATING THE APPEALS BELOW UPON THE MOTION OF APPELLANTS BELOW.

II. WHETHER A U.S. COURT OF APPEALS SHOULD REINSTATE AN APPEAL WHEN IT DISCOVERS THAT EX PARTE PREJUDICIAL COMMUNICATIONS FROM THE DISTRICT COURT INFLUENCED THE DISMISSAL OF THE APPEALS.

III. WHETHER A U.S. COURT OF APPEALS SHOULD RECALL ITS MANDATE TO PROTECT ITS OWN INTEGRITY WHEN IT HAS BEEN ADVISED THAT FAILURE TO PERFECT THE APPEALS HAS BEEN CAUSED IN PART BY THE ERRORS OF THE DISTRICT COURT AND COURT REPORTERS IN PROCESSING THE APPEALS AND NOT BY THE NEGLIGENCE OF THE APPELLANTS.

IV. WHETHER THE DISMISSAL OF APPEALS AND FAILURE TO RECALL THE MANDATES VIOLATES PETITIONERS' RIGHT TO DUE PROCESS WHEN FAILURE TO TIMELY PERFECT THE APPEALS WAS DUE TO ERRORS MADE BY THE DISTRICT COURT AND COURT REPORTERS IN PROCESSING THE APPEALS AND DUE TO UNAVOIDABLE ERRORS OF THE PRO PER APPELLANTS.

V. WHETHER THE DISMISSAL OF APPEALS AND FAILURE TO RECALL THE MANDATES VIOLATE PETITIONERS' RIGHT TO REPRESENT THEMSELVES AS GUARANTEED BY THIS COURT'S DECISION IN OSBORN V. PRESIDENT 22 US 738. WHEN THE DECISION TO DISMISS THE APPEALS AND NOT REINSTATE THEM WAS INFLUENCED BY COMMUNICATIONS FROM THE DISTRICT COURT JUDGE AND REPORTER WHO WERE PREJUDICED AGAINST PRO SE LITIGANTS.

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PETITION FOR WRIT OF CERTIORARI

The petitioners ELMER H. THOMASSEN, JOAN THOMASSEN, WILLIAM THOMASSEN, ROSE HORN and GEORGE THOMASSEN, pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Ninth Circuit, rendered April 30, 1981 and May 4, 1982 dismissing the appeals below and the order of June 15, 1982 denying the motion to recall the mandates and the order of August 20, 1982 denying the petition for rehearing and rejecting the suggestion for rehearing en banc. The judgment and orders are set forth in the appendix. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

OPINIONS BELOW

Ninth Circuit. There was no formal opinion rendered by the U.S. Court of Appeals for the Ninth Circuit. The orders entered are as follows: Order dismissing appeal No. 79-3562, entered April 30, 1981 (Appendix at A-9);

Order consolidating appeal Nos. 79-3596 and 79-3783 and denying motion to proceed on appeal in forma pauperis, entered August 25, 1981 (Appendix A-7);Order dismissing appeal Nos. 79-3596 and 79-3783, entered May 4, 1982 (Appendix A- 5); Order denying motion to recall mandates, entered June 15, 1982 (Appendix A-4); Order denying rehearing and rejecting suggestion for rehearing en banc, entered August 20, 1982 (Appendix A-2).

District Court. There was no formal opinion rendered in the district court below; however, the detailed Amended Judgment entered on July 12, 1982 is set forth in the Appendix at A-12 and Findings of Fact and Conclusions of Law at A-31.

JURISDICTION

The order dismissing two appeals below was entered May 4, 1982 (79-3596 and 79-3783) and a third appeal was dismissed on April 30, 1981. Within 14 days of the order dismissing the appeals, a motion to recall

the mandates was filed on May 17, 1982. The Ninth Circuit denied the motion to recall the mandates on June 15, 1982. A timely petition for rehearing with a suggestion for rehearing en banc was filed. The petition for rehearing was denied on August 20, 1982. The jurisdiction of the Court is invoked under 28 U.S.C. 1254 (1).

PRIMARY CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED.

Constititution of the United States, Amendment V:

> No person . . . nor shall be deprived of life, liberty or property, without due process of law;

Title 28, United States Code, Section 452

> The continued existence or expiration of a session of court in no way affects the power of the court to do any act or to take any proceeding.

Rule 41 (a) of the Federal Rules of Appellate Procedure.

> (a) Date of Issuance. The mandate of the court shall issue 21 days after the entry of judgment unless the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate shall issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.

Rule 19 (b) of the Local Rules for the U.S. Court of Appeals for the Ninth Circuit

> (b) Dismissal for Failure to Prosecute. When an appellant fails to timely file the record, pay the docket fee, file a brief or otherwise comply with rules requiring processing the appeal to hearing, the clerk will enter an order dismissing the appeal. The clerk will notify each appellant in writing of this provision of the rules.

STATEMENT OF THE CASE

This is an action brought by the United States in the United States District Court for the Central

District of California to set aside as fraudulant certain conveyances of real property from petitioners to third parties and to determine the validity and priority of liens against said real property. An Amended Judgment (Appendix at A-12) was entered on July 12, 1979, setting aside the conveyances as fraudulant and determining that the liens against the property were valid, which liens had priority over others, and ordering the sale of the real property to satisfy the liens. One of the properties is the residence of Elmer H. Thomassen and Joan Thomassen, petitioners herein.

Post trial motions for new trial and setting aside judgment, and for a stay without bond were denied.

Petitioners appealed to the United States Court of appeals for the Ninth Circuit timely. The first appeal, U.S. v. Elmer Thomassen, et al. (No. 79-3562) was brought by petitioner George Thomassen to appeal the judgment of July 12, 1979. The second appeal (No. 79-3596) was brought by petitioners Elmer H.

Thomassen, Joan Thomassen, William Thomassen and Rose Horn to appeal the judgment of July 12, 1979. The third appeal (No. 79-3783) was brought by all the petitioners above and appeals the denial of the post trial motions for new trial, stay pending appeal, approval of nominal supersedeas bond and for vacation or modification of the judgments.

A temporary stay of the appeal was granted pending determination of whether section 362 (a) of the Bankruptcy Code applied to the appeal (automatic stay provision). When the Ninth Circuit determined that the automatic stay provision of the Bankruptcy Code did not apply to the the appeals below, petitioners Elmer H. Thomassen and Joan Thomassen moved to appeal in forma pauperis because the judgment below had rendered them insolvent. This motion was denied (Appendix at A-11).

Subsequent to the denial of the motion, August 25, 1981, petitioners ordered the transcripts to be

transcribed and filed so that the certificate of record could be forwarded to the Ninth Circuit. The U.S. District Court lost or misplaced the trial transcripts, thus requiring the court reporter to file the transcripts several times and finally he was required to re transcribe the entire transcript for one of the trial days because the court lost or misplaced the transcripts again.

The Ninth Circuit dismissed the appeal of George Thomassen (No. 3562) on April 30, 1981 for failure to perfect the appeal and then dismissed the appeals Nos. 79-3596 and 79-3783 on May 4, 1982 for failure to perfect the appeals.

Petitioners filed a motion to recall the mandates and brought to the attention of the Ninth Circuit that the failure to perfect the appeals was not the fault of petitioners. The Ninth Circuit denied the motion on June 15, 1982. The appeals were perfected on June 25, 1982 and petitioners moved for a rehearing with a

suggestion for rehearing en banc. In support of the motion was a letter from the court reporter John Murdock (Appendix at A-67) stating that the failure to perfect the appeals was not due to the negligence of the appellants but due to the loss or misplacing of the transcripts by the district court and because of an understandable misunderstanding between another court reporter and the petitioners. On August 20, 1982 the U.S. Court of Appeals for the Ninth Circuit denied the motion for rehearing and suggestion for rehearing en banc. (Appendix at A-2).

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS HAS RENDERED A DECISION WHICH HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN NOT RECALLING THE MANDATE, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

A. The United States Court of Appeals for the Ninth Circuit should have exercised its power to recall the mandates in the appeals below and reinstate the petitioners appeals.

The U.S. Court of Appeals for the Ninth Circuit has the inherent power to recall the mandates issued in the case below which mandates dissmissed the appeals below. The inherent power is derived from Rule 41 of the Federal Rules of Appellate Procedure, although the power is not specifically provided for in the appellate rules. Briggs v. Pennsylvania R. Co., 334 U.S. 304, 306 (1948); Hazel-Atlas Glass Co. v. Hartford-Empire Co. 322 U.S. 238, 244-245 (1944); Sparks v. Duval County Ranch Co., Inc. 604 F2d 976 (5th Cir. 1979). It further has the power to recall and amend its mandate to protect the integrity of its own processes. Briggs v. Pennsylvania, supra at 306; Perkins v. Standard Oil Co. of California, 487 F.2d 672 (9th Cir. 1973); Samson Tire & Rubber Corporation v. Rogan, 140 F.2d 457 (9th Cir. 1943); Huntley v. Southern Oregon Sales, 104 F.2d 153, 155 (9th Cir. 1939); accord, Petersen v. Klos, 433 F.2d

911, 912 (5th Cir. 1970).

Court of appeals' mandates may be recalled to avoid injustice, Alphin v. Henson 552 F.2d 1033 (4th Cir. 1977), certiorari denied 434 U.S. 823; Gradsky v. U.S. 376 F.2d 993 (5th Cir. 1967) certiorari denied 389 U.S. 908; Sun Oil Co. v. Burford 130 F.2d 10 (5th Cir. 1942) revd . on other grounds 319 U.S. 315, rehearing denied 320 U.S. 214.

Even prior to the enactment of section 452 of the Judicial Code in 1948, judgments were set aside after the term in which the judgment was rendered had expired when the enforcement of a judgment was considered unconscionable or where the judgment had been obtained fraudulently. Hazel-Atlas Glass Co. v. Hartford-Empire Co. , supra at 244-245; Pickford v. Talbott 225 U.S. 651. With the enactment of section 452 of the Judicial Code in 1948 the distinction between recalling the mandate during the same term that the judgment was rendered and later relief was abolished:

> The continued existence or expiration of a session of court in no way affects the power of the court to do any act or to take any proceeding. 28 U.S.C. 452.

The circumstances which caused the failure of petitioners to perfect the appeals below were unusual and unavoidable and not due to the negligence of the petitioners, but due to the errors of the court and court reporters, and therefore the United States Court of Appeals for the Ninth Circuit should have exercised its power to recall the mandates in the instant appeals and reinstate the appeals, and this Court should exercise its supervisory powers to order the recall of the mandates in the instant appeals and reinstate the appeals to avoid injustice and protect the integrity of the courts.

Because the decision in the District Court below in 1979 (Appendix A-12) rendered the petitioners insolvent, the petitioners filed for relief in the United States Bankruptcy Court for the Central District of California in January 1980. In the early months of the appeals below (Nos. 79-3562, 79-3596, 79-37883) in the

Ninth Circuit, the appeals were stayed by the U.S. Court of Appeals for the Ninth Circuit to determine whether the automatic stay provision of the recently enacted 11 U.S.C. 362 (a) of the Bankruptcy Code applied to the instant appeals. After a determination that the automatic stay did not apply to the appeals herein, the stay was removed and the petitioners Elmer H. Thomassen and Joan Thomassen moved to appeal in forma pauperis because of their insolvency. The U.S. District Court for the Central District of California denied petitioners' request to appeal in forma pauperis. (Appendix at A-11).

Through no fault of the petitioners, but due to the errors of the court and the court reporter, the trial transcripts could not be found by the District Court or the court reporter. This required the court reporter, John Murdock, to refile several copies of the transcripts and re-transcribe the transcripts. On April 30, 1981 appeal No. 79-3562 was dismissed for failure to perfect the appeal (Appendix A-9). On May 4, 1982, the U.S.

Court of Appeals for the Ninth Circuit entered an order dismissing the appeals Nos. 79-3596 and 79-3783 for failure to perfect the appeals pursuant to Local Rule 19 (b). (Appendix A- 5).

Petitioners filed a Motion to Recall the Mandates. The motion was denied on June 15, 1982 (App. at A-4). Petitioners then filed a Motion for Rehearing with a Suggestion for Rehearing en Banc. In support of that motion for rehearing, court reporter John Murdock wrote a letter to the U.S. Court of Appeals for the Ninth Circuit on June 25, 1982 explaining the unavoidable problems which prevented the perfection of the appeals, and a copy of said letter was attached to the Appellants' Joint Motion for rehearing with a Suggestion for Rehearing en banc of Appellants' Motion to Recall the Mandates, as Exhibit A (App. at A-67). Said Motion for Rehearing was also denied on August 20, 1982. (Appendix at A-2).

In Mr. Murdock's letter dated June 25, 1982

(Appendix at A67) to the U.S. Court of Appeals for the Ninth Circuit, Mr. Murdock explained that the appeals had not been perfected because the transcripts had notbeen completed and the certificate of record was to be forwarded by the Clerk of the U.S. District Court for the Central District of California either on June 25, 1982 or the following Monday. (Certificate of Record, Appendix at A-72). It was further explained by Mr. Murdock in his letter that the errors were unfortunate but understandable and apparently not the fault of the appellants/petitioners.

In the instant case the appeals below had not been timely perfected because of mistake, inadvertance, and unavoidable errors on the part of the district court in losing the transcripts on the part of the appellants. The Ninth Circuit should have set aside the mandates to protect its own integrity and to prevent injustice, and not to do so was an abuse of discretion. All of the transcripts in the appeals are now complete and ready to be forwarded to the Ninth Circuit by the district

court. The Certificate of Record has been filed since June 25, 1982. The appeals are now perfected and ready to be briefed when this Court reinstates the appeals.

Wherefore, petitioners request that this Court exercise its supervisory power to order the recall of the mandates of the Court of Appeals below and order the reinstatement of the appeals below. Petitioners have no other adequate remedy at law or equity. Suing the Court or court reporters would not reinstate the appeals nor adequately compensate for the value of the property involved in these appeals.

B. It is within the supervisory powers of the Supreme Court to correct the grave injustice done to petitioners and failure to do so would result in a denial of due process which is guaranteed by the due process clause of the Fifth Amendment and a violation of petitioners' right to represent themselves without an attorney per the holding of this Court in Osborn v. President, 22 U.S. 738.

Petitioners request that this Court exercise its power to supervise the U.S. Court of Appeals for the Ninth Circuit because of the grave injustice that will be done to the petitioners if they are not permitted the opportunity to appeal the U.S. District Court decision below (Appendix at A-12). Petitioners will further be denied their day in court as guaranteed by the due process clause of the Fifth Amendment if their appeals are not reinstated.

The U.S. District Court below set aside conveyances of real property which were conveyed from petitioners Elmer H. Thomassen and Joan Thomassen in 1972 to William Thomassen, Rose Horn and George Thomassen. The District Court below further ordered that liens of various creditors were valid liens against said property and declared the priority of the liens and ordered the real property sold to satisfy said liens. (Amended Judgment, Appendix at A-12).

The real estate which is the subject matter o the appeals below is valued in excess of $500,000.00 and includes the residence of petitioners Elmer H. Thomassen and Joan Thomassen.

Throughout the proceedings below in the U.S. District Court for the Central District of California in Los Angeles, Judge Manuel Real, presiding, the pro per defendants Elmer H. Thomassen, Joan Thomassen, Rose Horn, and William Thomassen maintained that they had not been properly served and moved to dismiss the action because of improper service on them and moved to quash summonses allegedly served on them. Defaults were entered against Elmer H. Thomassen, Joan Thomassen, William Thomassen and Rose Horn for their failure to answer the complaint and motions to set aside defaults were denied.

In spite of entering defaults against Elmer H. Thomassen, Joan Thomassen, William Thomassen and Rose Horn, presiding Judge Manuel Real did permit the

defendants to participate in the trial on March 13, 1979 and March 14, 1979 and permitted Elmer H. Thomassen and Joan Thomassen to argue pre-trial and post-trial motions; thus, in effect, nullifying his entry of defaults against Elmer H. Thomassen and Joan Thomassen.

Throughout the proceedings in district court Judge Manuel Real evidenced prejudice against pro per litigants Elmer H. Thomassen and Joan Thomassen and refused to relax the Local Rules and Federal Rules of Civil Procedure and refused to relax the Rules regarding form of pleadings, timeliness, shortening time for filing motions and other formalities of the proceedings, as it pertained to the pro per litigants; however, on the other hand, the Court repeatedly relaxed the Rules for the other parties who were represented by counsel.

Pro per litigants Elmer H. Thomassen and Joan Thomassen moved on March 13, 1979 to have Judge Real disqualify himself because he was prejudiced

against pro per litigants and against Elmer H. Thomassen and Joan Thomassen in particular. Judge Real refused to disqualify himself.

When petitioners Elmer H. Thomassen and Joan Thomassen moved for an order regarding appeal in forma pauperis before District Judge Manuel Real on December 10, 1979, Judge Real again showed his prejudice against the petitioners Elmer H. Thomassen and Joan Thomassen by his remarks at the end of the motion when he denied petitioners' motion. Denial entered December 18, 1979. (Appendix at A-11)

Motion denied. This appeal is frivolous and interposed only for the purpose of delay. Defendant Elmer and Joan Thomassen were in default in the matter and were allowed appearance only as a matter of grace.

Judge Real again showed his prejudice against the pro per litigants when his personal court reporter

Florence Carcia made ex parte remarks to the Ninth Circuit, in her communication dated April 16, 1982 to the Ninth Circuit, in a Motion for Extension of Time to file Transcript: (Appendix at A-74)

> This man is just trying to avoid the inevitable and his appeal should be dismissed. If it has been dismissed, thanks for notifying the reporter.

The above remarks were improper and unprofessional ex parte communications and improperly influenced the Ninth Circuit to dismiss the appeals below. Petitioners/ appellants did not discover this ex parte communication until after the appeals had been dismissed. The U.S. District Court judge below and his court reporter improperly influenced the Ninth Circuit to dismiss the petitioners' appeals because of their prejudice against pro se litigants. This is in violation of petitioners' rights since they have the right to represent themselves in court, as this Court held in Osborn v. President, Directors & Co. of Bank, 22 U.S. 738.

The appeals which the petitioners request to have reinstated are not frivolous. The petitioners enumerated nine issues in their "Statement of Issues on Joint Appeal" filed October 4, 1979 which are all valid issues for appeal and are not frivolous. The issues enumerated by attorney John Joseph Matonis were as follows:

1. The statute of limitations has run against the plaintiff and or crossclaimants because the state statute applies.

2. No bond is needed to stay collection of Tax Court assessment, because Appellant Elmer Thomassen and Appellant Joan Thomassen were in forma pauperis, or, in the alternative, Title 26, United States Code, Section 7485, violates the due process clause of the Fifth Amendment.

3. A jury trial was demanded timely, but this demand was refused by the Court.

4. Appellant Joan Thomassen was represented in Tax Court, and in this Court by her husband, who was not a licensed attorney and, therefore, the Tax Court judgment is void and cannot be collected.

5. Judge Manuel Real was grossly unfair to the defendants and was biased and prejudiced against these defendants in favor of the United States of America and the Franchised Tax Board of the State of California, a cross-claimant, as well as some of the other defendants.

6. Defendants and Appellants Elmer Thomassen, Joan Thomassen, William Thomassen, and Rose Horn were never legally served with process; and/or were defaulted without due process.

7. Judge Real signed the Amended Judgment on June 8, 1979, while the Defendants Elmer and Joan Thomassen, William Thomassen, George Thomassen, and Rose Horn still had an opportunity to respond timely.

8. Appellants Joan and Elmer Thomassen should have the opportunity to reopen the Tax Court proceedings to substantiate deductions in order to prevent a miscarriage of justice; i.e., the collection of an amount of a tax far in excess of any real liability, which assessment resulted from Elmer Thomassen's excusable neglect and misunderstanding of the Fifth Amendment privilege not to be a witness against himself, as well as Joan Thomassen's being represented by Elmer Thomassen, her husband, while he was not a licensed attorney and while he was not a member of the bar.

9. Under the Ninth Amendment of the Constitution, a federal court lacks the power and jurisdiction to hear and determine claims between a state and a citizen of this state or another state and claims between a state and the federal government relating to liability and property rights of a citizen of that state or another state.

Further, pro per litigants now have an attorney who will represent them in the U.S. Court of Appeals for the Ninth Circuit if their appeals are reinstated.

CONCLUSION

It is respectfully submitted that this petition for certiorari should be granted in order to prevent the grave injustice done to petitioners, to protect the integrity of the judicial system and to afford the petitioners their day in court, which will all be possible if the Supreme Court exercises its supervisory power to order the U.S. Court of Appeals to recall its mandates and reinstate the petitioners' appeals.

November 17, 1982.

Respectfully submitted.

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APPENDIX TO
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APPENDIX

JUDGMENTS AND ORDERS

(COPY)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff, Appellee,	)
	)Nos. 79-3562,
	)79-3596 and
vs.	)79-3783
	)
ELMER THOMASSEN, JOAN THOMASSEN, ROSE HORN, et al. Defendants,	)DC# CV78-1731R
	)Central California
and	)
	)
GEORGE W. THOMASSEN, Defendant-Appellant.	)ORDER
	)
	)Filed
	Aug. 20, 1982
Before: WALLACE and FARRIS, Circuit Judges	Phillip B. Winberry Clerk, U. S. Court

The panel as constituted in the above case voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35 (b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

(COPY)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff, Appellee,	)
	)Nos. 79-3562,
	)79-3596 and
vs.	)79-3783
	)
ELMER THOMASSEN, JOAN THOMASSEN, ROSE HORN, et al. Defendants,	)DC# CV78-1731R
	)Central California
and	)
	)
GEORGE W. THOMASSEN, Defendant-Appellant.	)ORDER
	)
	)Filed Jun 15, 1982

Phillip B. Winberry
Clerk, U.S. Court
of Appeals

Before: WALLACE and FARRIS, Circuit Judges

Appellants' motion to recall the mandate is denied.

(COPY)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ELMER THOMASSEN, et al., Defendants-Cross- Defendant/Appellant, vs. FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Cross-Claimant/Appellee.	)))CA No. 79-3596) 79-3783))DC No. CV78-)1731R)Central)California))))ORDER
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ELMER THOMASSEN, et al. Defendants-Appellants.	))Filed May 4,)1982)Phillip B.)Winberry, Clerk)U.S. Court of)Appeals

A review of the file in the above captioned case has revealed that the appellant has failed to perfect the appeal as prescribed by the Federal Rules of Appellant Procedure.

Pursuant to Rule 19 (b) of the Rules of the Ninth Circuit, this appeal is dismissed for failure to comply

with the rules requiring processing the appeal to hearing.

A certified copy of this order to the district court shall constitute the mandate.

FOR THE COURT:
Phillip B. Winberry,
Clerk of the Court

BY: Jeraldine Curtis
Deputy Clerk.

(COPY)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ELMER THOMASSEN, et al. Defendants-Appellants, FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Cross-Claimant-Appellee, vs. ELMER THOMASSEN, et al., Cross-Defendants-Appellants.	CA No. 79-3596 79-3783 DC#CV781731MR Central California ORDER Filed Aug. 25, 1981; Richard Deane; Clerk, U.S. Court of Appeals

Before: WALLACE and BOOCHEVER, Circuit Judges.

These appeals are ordered consolidated for all purposes. Appellant Elmer Thomassen's motion for leave to proceed on appeal in forma pauperis in order to have fee for preparation of the reporter's transcript paid by the United States is denied.

Within twenty-one (21) days of the date of entry

of this order, appellants shall arrange for the filing of the certificate of record by the district court. If the appellants fail to comply with this order, the Clerk shall dismiss the consolidated appeals pursuant to 9th Cir. R. 19 (b).

(COPY)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ELMER THOMASSEN, JOAN THOMASSEN, ROSE HORN, et al. Defendants, and GEORGE THOMASSEN, Defendant-Appellant,	CA No.79-3562 DC #CV78-1731R Central California ORDER Filed April 30, 1981; Richard Deane; Clerk, U.S. Court of Appeals

A review of the file in the above captioned case has revealed that the appellant has failed to perfect the appeal as prescribed by the Federal Rules of Appellate Procedure.

Pursuant to Rule 19 (b) of the Rules of the Ninth Circuit, this appeal is dismissed for failure to comply with the rules requiring processing the appeal to hearing.

A certified copy of this order to the district court shall constitute the mandate.

FOR THE COURT:

Richard H. Deane
Clerk of Court

By: /s/ Jereldine Curtis
Jereldine Curtis
Deputy Clerk

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	) CA No. 79-3596
	)
Plaintiff,	)
	)
vs.	) MOTION, AFFIDAVIT
	) and ORDER RE
ELMER THOMASSEN, et al.,	) APPEAL IN FORMA
	) PAUPERIS (28 USC
Defendant.	) 753(f) and 1915)

Filed December 18, 1979; Clerk, U.S. District Court, Central District by Deputy

MOTION and AFFIDAVIT

(contents omitted)

(standard court form)

Motion denied, this appeal is frivolous and interposed only for the purpose of delay. Defendant Elmer and Joan Thomassen were in default in the matter and were allowed appearance only as a matter of grace.

/s/ Real

(COPY)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ELMER THOMASSEN, et al., Defendants.	No. CV 78-1731-R AMENDED JUDGMENT ENTERED July 12, 1979

This action came on for trial before this Court, the Honorable Manuel L. Real presiding, and the issues having been duly tried and a decision having been duly rendered,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That Elmer and Joan Thomassen are jointly and severally liable to the United States of America in the sum of $428,197.03 as of June 4, 1979, together with interest thereon at the rate of $38.09 per day and

failure to pay penalties in the amount of $1,105.25 accruing on the 24th day of June and on the 24th of each month thereafter until judgment is entered, plus interest at the rate of seven percent (7%) per annum, and the costs incurred by the United States of America in this action.

2. That Elmer Thomassen is liable to the United States of America in the sum of $64,843.00 as of June 4, 1979, together with interest thereon at the rate of $7.09 per day until judgment is entered, plus interest at the rate of seven percent (7%) per annum.

3. That Joan Thomassen is liable to the United States of America in the sum of $62,907.32 as of June 4, 1979, together with interest thereon at the rate of $6.86 per day until judgment is entered herein, plus interest at the rate of seven percent (7%) per annum.

4. That the following conveyances of real property made by defendants Elmer and Joan

Thomassen are set aside as null and void:

a. The Deed of Trust, dated September 1, 1972, to Rose Horn and the conveyance on September 7, 1972, by Grant Deed to George Thomassen of the real property commonly known as 1918 Dover Drive, Newport Beach, California, described in Paragraph I of Exhibit A attached hereto.

b. The conveyances on January 6, 1972, by Grant Deed, and on September 25, 1972, by Quitclaim Deed, to Rose Horn of the Silverado Canyon Property described in Paragraph II of Exhibit A attached hereto.

c. The conveyance on January 14, 1973, by Quitclaim Deed, to William L. Thomassen of the real property in the City of Orange described in Paragraph III of Exhibit A attached hereto.

d. The conveyance on January 15, 1972, by Grant Deed, to William L. Thomassen of the real property in Riverside County described in Paragraph IV of Exhibit A attached hereto.

e. The conveyance on July 14, 1972, by Grant Deed, to Rose S. Horn of real property in Riverside County described in Paragraph V of Exhibit A attached hereto.

5. That the United States of America has valid and existing federal tax liens against the interest of Elmer and/or Joan Thomassen in each of the properties described in Exhibit A attached hereto, and that such liens are foreclosed against each of the properties so described.

6. That Rose Horn, George W. Thomassen, and William L. Thomassen have no right, title or interest in any of the properties described in Exhibit A attached

hereto.

7. That the interests of Elmer and Joan Thomassen in properties described on Exhibit A attached hereto, are ordered to be sold in accordance with the provisions of Title 28, United States Code, Sections 2001 and 2002.

8. Any party to this proceeding or any person claiming an interest in any of the properties described in Exhibit A attached hereto may move the Court, pursuant to Title 28, United States Code, Section 2001 (b), for an order for a private sale of any of the described properties. Any such motion shall be filed within twenty (20) days of the date of this judgment and shall set forth with particularity (a) the nature of the moving parties' interest in each property for which a private sale is sought, (b) the reasons why the moving party believes that a private sale would be in the best interests of the United States of America and the other creditors involved herein, (c) the names of three proposed appraisers and a short statement of their

qualifications, and (d) a proposed form of order stating the terms and conditions of the private sale. Any such motion shall comply with Rule 3 of the Local Rules of the District Court for the Central District of California.

9. The United States Marshal for the Central District of California is ordered to sell any property which does not become the subject of a motion pursuant to the preceding paragraph, in separate parcels in accordance with Title 28, United States Code, Sections 2001 (a) and 2002. Each of the five properties shall be sold separately at locations to be selected by the United States Marshal.

a. Notice of each sale shall be published once a week for at least four (4) weeks prior to the sale in at least one (1) newspaper regularly issued and of general circulation in the county in which the property to be sold is located. Said notice shall describe the

property as set forth on Exhibit A attached hereto, and shall contain the terms and conditions of sale as set out herein.

b. The terms and conditions of sale shall be as follows:

A minimum bid equal to the market value as determined by the most recent county tax bill shall be required. The United States of America may bid a credit against its judgment and interest thereon, costs and expenses without tender of cash. The terms of sale as to all other persons or parties bidding shall be cash. The successful bidder shall be required to deposit with the United States Marshal cash equal to twenty percent (20%) of his total bid immediately upon the property being

struck off and awarded to him as the highest and best bidder; and the remaining eighty percent (80%) of said purchase price to be paid on or before 5:00p.m., three (3) days, inclusive of the date of sale. Should any person bid off property at sale by virtue of this Judgment and Order of Sale, and fail to comply with the terms of the sale, he shall be liable to the plaintiff for twenty percent (20%) on the value of the property thus bid off as a penalty, and said deposit shall be paid over and delivered to plaintiff to be applied toward payment of said penalty, but payment of said penalty shall not be a credit on the judgment of plaintiffs.

c. Upon selling any property, the United States Marshal shall prepare and file with this Court an accounting and report of sale

and shall give to the purchaser a Certificate of Sale containing the description of the property sold and the price paid. The accounting and report of sale shall be filed within ten (10) days from date of sale. If no objections have been filed in writing in this cause with the Clerk of the Court, within fifteen (15) days of the date of sale, the sale shall be confirmed without necessity of motion, and the United States Marshal shall be directed by the Clerk of the Court to execute and deliver his deed to said purchaser.

d. Possession of the property sold shall be yielded to the purchaser upon the production of the Certificate of Sale and Deed; and if there is a refusal to so yield, a Writ of Assistance may, without further notice, be issued by the Clerk of this Court to compel delivery of the property sold to the

purchaser.

e. The United States Marshal shall apply the proceeds of sale to expenses of sale and then in the following order of priorities:

(1) First, in satisfaction of any unpaid secured real property liens against any property on the date of sale. As to the properties located in Orange County, the amounts due under this paragraph as of April 10, 1979 are: $348.06 for the property described in Paragraph I of Exhibit A attached hereto; $191.80 for the property described in Paragraph II; and $1,842.79 for the property described in Paragraph III of Exhibit A attached hereto.

(2) Second, in satisfaction of the

Deed of Trust filed in favor of Great Western Savings and Loan Association in the amount of $3,303.32, less any payments credited against said Trust Deed subsequent to January 12, 1979, provided, however, that this paragraph shall apply only to the sale of the property located at 1918 Dover Drive, Newport Beach, California, and described in Paragraph I of Exhibit A attached hereto.

(3) Third, in satisfaction of the judgment of defendant Robert Burkhead in the amount of $47,500.00, together with interest thereon at the rate of seven percent (7%) per annum since March 19, 1973, provided, however, that this paragraph shall apply only to sale of those properties located in Orange County, California,

described in Paragraph I, II, and III of Exhibit A attached hereto.

(4) Fourth, in satisfaction of the judgment of the County of Orange in the amount of $1,813.05, together with interest thereon at the rate of seven percent (7%) per annum since November 25, 1975, provided, however, that this paragraph shall apply only to sales of those properties located in Orange County, California, described in Paragraph I, II, and IIIof Exhibit A attached hereto.

(5) Fifth, in satisfaction of the judgements of the United States of America set forth in Paragraphs 1, 2, and 3 hereof.

(6) Sixth, in satisfaction of the

County of Orange's unsecured Certificates of Delinquency in the total amount of $2,931.10, together with penalties thereon accruing at the rate of $20.72 per month commencing on May 1, 1979, provided, however, that this paragraph shall apply only to sales of those properties located in Orange County, California, described in Paragraphs I, II, and III of Exhibit A attached hereto.

(7) Seventh, in satisfaction of the liens of the States of California, Franchise Tax Board, in the amount of $107,378.49, together with interest thereon at the rate of $22.22 per day commencing on April 4, 1979.

f. If any surplus remains after making the aforesaid payments, the United States Marshall shall so report, and return and pay the same into the

registry of this Court for distribution under further order of this Court; if the proceeds of said sale be insufficient to pay the amount due the plaintiff, after first deducting the costs of sale, and it shall so appear from the United States Marshal's Return and Report of Sale, a further hearing in this case shall be had for the purpose of establishing the amount of a deficiency judgment, if any, to be entered against the defendants Elmer and Joan Thomassen.

10. The Court hereby retains jurisdiction of this action for the purpose of making proper distribution of any surplus of the proceeds of sale, or of entering a deficiency judgmeent, whichever may be proper, pursuant to the United States Marshal's Accounting and Report of Sale.

United States v./ Elmer Thomassen,
et al.. No. CV78-1731-R

Dated: This 8th day of June, 1979

Manuel L. Real
U.S. District Judge

DESCRIPTION OF REAL PROPERTY SUBJECT TO SALE

I.

Lot 7 of Tract No. 3004, as shown on the map recorded in Book 92, pages 1 and 2 of Miscellaneous Maps, records of Orange County County, California, commonly known as 1918 Dover Drive, Newport Beach, California.

II.

Lot 4 of Tract 699, as shown on map recorded in Book 21, page 16 of Miscellaneous Maps, records of Range County, California.

III.

The North 40 feet of Lot 14 of "Mrs. Pearl F. Hollister's Subdivision of the South 4 acres of the East one-half of the Southeast quarter of Lot No. 4, in Block G of the A.B. Chapman Tract" in the City of Orange, County of Orange, State of California, as per map thereof recorded in Book 4, page 45 of Miscellaneous

Maps, records of said Orange County, California.

IV.

Parcel 1:

All that portion of the Southwest quarter of Section 31, Township 3 South, Range 4 West, San Bernardino Base and Meridian, more particularly described as follows:

Beginning at the center quarter section corner of said Section 31;

Thence South along the North-South quarter section line of said Section 31 a distance of 663.74 feet to a point thereon;

Thence South 89 degrees 18'10" West a distance of 660.98 feet;

Thence North 00 degrees 92'45" West a distance of 664.01 feet to a point on the East/West quarter section line of said Section 31;

Thence North 89 degrees 19'30" East along said

East-West quarter section line a distance of 660.45 feet to the point of beginning.

Said property is shown as Parcel 1 on Record of Survey recorded in Book 39 Page 95 of Records of Survey, Records of Riverside County, California.

Parcel 2.

An easement for road and public utilities purposes over, under and across the Westerly 20 feet of the Southwest quarter of the Southwest quarter and the South half of the Northwest quarter of the Southwest quarter of Section 31, Township 3 South, Range 4 West, San Bernardino Base and Meridian.

Parcel 3:

An easement for road and public utilities purposes, 20 feet wide, over, under, and across that portion of the Southwest quarter of Section 31, Township 3 South, Range 4 West, San Bernardino Base and Meridian, lying 10 feet on each side of the following

described center line:

Beginning at the Southwesterly corner of the Northeast quarter of the Northeast quarter of said Southwest quarter;

Thence Westerly to the Southeasterly corner of the North half of the Northwest quarter of said Southwest quarter;

Thence Westerly along the Southerly line of said South half to the Southwesterly corner thereof;

Parcel 4;

An easement for road and public utilities purposes, 20 feet wide, over, under and across that portion of the Northeast quarter of the Southwest quarter of Section 31, Township 3 South, Range 4 West, San Bernardino Base and Meridian, lying 10 feet on each side of the following described center line:

Beginning at the Southeasterly corner of the Northeast quarter of the Northeast quarter of said

Southwest quarter;

Thence South 89 degrees 19' 10" West, along the Southerly line of said Northeast quarter of the Northeast quarter of said Southwest quarter, 660.98 feet to the Southwesterly corner thereof.

Parcel 5:

An easement for road and public utilities purposes, over , under, and across the Easterly 25 feet of the Southwest quarter of Section 31, Township 3 South, Range 4 West, San Bernardino Base and Meridian.

V.

That portion of the Southeast quarter of Section 18, Township 5 South, Range 4 West, San Bernardino Base and Meridian, lying Easterly of the center line of Toro Canyon Road, as shown on Record of Survey on file in book 25 page 10 of Records of Survey, Riverside County Records, California.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ELMER THOMASSEN, et al., Defendants.	No. CV78-1731-R AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action came on for trial before the Court, the Honorable Manuel L. Real, Judge, presiding, on March 13, 1979. Plaintiff United States of America was represented by Assistant United States Attorney William J. James. Defendants Elmer and Joan Thomassen appeared in pro per; defendant George Thomassen was represented by Gary J. Joslin; defendant Robert Burkhead was represented by Robert Priver; defendant County of Orange was represented by Deputy County Counsel Terry E. Dixon; defendant State of California was represented by Deputy Attorney General Patti S. Kitching; defendants Great Western Savings & Loan Association and California Reconveyance

Company were represented by Lawrence R. Lieberman; and defendants William T. Ludwig and Betty J. Flaherty were represented by George Xanthos. The issues having been duly tried and a decision having been duly rendered, the Court makes findings of fact and conclusions of law as follows:

FINDINGS OF FACT

1. This is an action by the United States of America to reduce certain tax liabilities to judgment, to set aside a series of conveyances of real property by taxpayers Elmer and Joan Thomassen as fraudulent, and to foreclose federal tax liens against such properties.

2. On or about April 17, 1957, a trust deed executed by Elmer and Joan Thomassen in favor of Great Western Savings & Loan Association was filed in the official records of Orange County, California. Subsequently California Reconveyance Company succeeded Santa Ana Escrow Company as trustee under such trust deed.

3. In each of the years 1965-1971, Elmer and Joan Thomassen incurred liabilities for unpaid income taxes. Notices of deficiencies for such years were sent to Elmer and Joan Thomassen in the amount of $317,087.72.

4. Prior to any of the conveyances which are the subject matter of this action, the Thomassens petitioned the United States Tax Court for Redeterminations of such deficiencies.

5. In addition to the problems which were mounting with the Internal Revenue Service, several substantial lawsuits were filed against Elmer Thomassen, an orthopedic surgeon, during the period of 1970-1972 alleging medical malpractice.

6. On March 19, 1973, a judgment was entered against Dr. Thomassen for medical malpractice, in favor of Robert Burkhead, one of the defendants in this action, in the amount of $50,000.

7. On April 4, 1973, an Abstract of Judgment in favor of Robert Burkhead was recorded in the official records of Orange County, California.

8. During the years 1972 and 1973, the Thomassens made the following conveyances of real property:

a. A conveyance by Deed of Trust dated September 1, 1972, to Rose Horn and a conveyance on September 7, 1972, by Grand Deed to George Thomassen of real property commonly known as 1918 Dover Drive, Newport Beach, California, described in Paragraph II of Exhibit A attached hereto.

b. Conveyances on January 6, 1972, by Grant Deed, and on September 25, 1972, by Quitclaim Deed, to Rose Horn of one-half interest in Silverado Canyon Property described in Paragraph II of Exhibit A attached hereto.

c. A conveyance on January 14, 1973, by Quitclaim Deed to William L. Thomassen of real property in the City of Orange described in Paragraph

III of Exhibit A attached hereto.

d. A conveyance on January 15, 1972, by Grand Deed to William L. Thomassen of real property in Riverside County described in Paragraph IV of Exhibit A attached hereto.

e. A conveyance on July 14, 1972, by Grand Deed to Rose S. Horn of a one-third interest in real property in Riverside County described in Paragraph V of Exhibit A attached hereto.

9. These conveyances were each made to close relatives of the Thomassens without adequate consideration. George Thomassen is Elmer Thomassen's brother; Rose Horn is Joan Thomassen's mother; and William L. Thomassen is Elmer and Joan Thomassen's son.

10. The above conveyances lacked any economic reality and the Thomassens continued to enjoy the possession or control of the properties after such conveyances. The Thomassens have contined to occupy the property at 1918 Dover Drive, Newport Beach,

California, as their home through the time of this trial.

11. During the period 1969-1972, Elmer Thomassen arranged to have the employees of his medical practice paid through a dummy corporation known as Peppertree Professional Services, placed his automobiles and business assets under the names of various third parties, and transferred funds to a bank account in Switzerland.

12. Each of the conveyances set forth in Paragraph 8 was made by the Thomassens with complete knowledge of their outstanding liabilities, including their tax liabilities. The Thomassens received the notices of deficiencies which formed the basis for their petitions to the United States Tax Court prior to executing any of the instant conveyances. The conveyances set forth in subparagraph 8.a-c, supra, were not recorded until March 19, 1973, after a verdict had been returned in the action filed by Robert Burkhead.

13. The series of conveyances set forth in Paragraph 8 rendered Elmer and Joan Thomassen insolvent.

14. On June 2, 1975, the United States Tax Court entered its decisions in favor of the Government finding deficiencies for the years 1964-1971, not including interest or penalties, in the amount of $317,087.72.

15. On October 13, 1975, the Internal Revenue Service entered its assessments against the Thomassens for the years 1964-1971, including interest, in the total amount of $428,669.58, and sent notice and demand for payment thereof to the Thomassens.

16. The Thomassens have neglected or refused to pay any of the above federal tax assessments.

17. On December 31, 1975, the County of Orange filed an Abstract of Judgment in the official

records of Orange County in the amount of $2,028.57.

18. On April 7 and 30, 1976, notices of federal tax liens were recorded in the official records of Orange and Riverside Counties in the amount of the above-referenced assessments.

19. On February 23, and on April 17, 1978, the State of California, Franchise Tax Board, filed Certificates of Amount of Tax, Interest and Penalties Due, in Orange and Riverside Counties, in the total amount of $97,579.86.

20. The County of Orange has the following liens for secured property taxes: (1) against the property described in Paragraph I of Exhibit A attached hereto for tax year 1978-79 in the amount of $348.06; (2) against the property described in Paragraph II of Exhibit A for tax year 1978-79 in the amount of $191.80; and (3) against the property described in Paragraph III of Exhibit A for tax years 1974-75 through

1978-79 in the amount of $1,842.79. The County of Orange has liens for secured property taxes against each of these properties for secured property taxes for tax year 1979-80 in an amount that has yet to be determined.

21. The County of Orange has liens for unsecured property taxes against the properties described in Paragraphs I, II and III of Exhibit A by virtue of the recordation of Certificates of Delinquency of Personal Property Tax, Nos. 04434, 05120, 05119, 06450, 06451, 07599, 07600, 05892, and 05891, in the Official Records of Orange County, California, between November 7, 1972, and December 17, 1976, in the amounts indicated thereon.

22. The Franchise Tax Board of the State of California has valid and existing state tax liens against the interests of Elmer and/or Joan Thomassen in each of the properties described in Exhibit A attached hereto.

23. No evidence was presented to show any interest of William Thomassen in any of the properties in question.

24. Ruth M. Cole, Gerald Huestis, and Safeway Title Insurance Co. have disclaimed any interest in the subject matter of this action.

25. The defaults of Elmer Thomassen, Joan Thomassen, Rose Horn, and William Thomassen were taken prior to the commencement of the trial in this action.

CONCLUSIONS OF LAW

1. Where it is determined that a conveyance is fraudulent as to a creditor, the conveyance may be set aside, ab initio, or disregarded, so as to permit the creditor to satisfy his claim. California Civil Code (C.C.C.), Sections 3439.09 and 3439.10.

2. Every conveyance made by a person who is

or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent, if the conveyance is made without fair consideration or at a time when the conveyor believes that he will incur debts beyond his ability to pay as they mature. C.C.C., Sections 3439.04 and 3439.06. A person insolvent within the meaning of the statute when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured. Section 3439.02, subd.(a); Aggregates Associated, Inc. vs. Packwood, 58 Cal. 2d 580, 589.

3. Under the Uniform Fraudulent Conveyance Act (C.C.C. Sections 3439.01 and 3439.13), a voluntary conveyance made without adequate consideration at a time when there are existing indebtedness is presumptively fraudulent and the burden of proof concerning solvency shifts to the parties to the transactions. Neumeyer v. Crown Funding Corp., 56 Cal. App. 3d 178, 190 (1976).

4. Income taxes become due and owing to the United States as of the date prescribed by law for the filing of a return. Sections 6151(a) of Title 26, United States Code. Therefore, the United States of America was an existing creditor of Elmer and Joan Thomassen long before the transfers in question despite the fact that it was prohibited from assessing such taxes due to the pendency of the Tax Court proceedings. Hartman vs. Lauchli, 238 F. 2d 881, 887 (8th Cir. 1956), cert. denied, 353 U.S. 965.

5. Every conveyance made with the actual intent to hinder, delay or defraud either present or future creditors is fraudulent as to both present and future creditors. C.C.C., Section 3439.07.

6. Because of the difficulty of direct proof of actual intent to defraud creditors, it is proper to show the inferences of fraudulent intent from the circumstances surrounding the conveyances and the relationships and interests of the parties to the

transactions. United States v. Bertie, 529 F. 2d 506, 508 (9th Circ. 1976); Nuemeyer v. Crown Funding Corp., supra.

7. Each of the conveyances described in Paragraph 8 of the Court's Findings of Fact was fraudulent as to creditors of Elmer and Joan Thomassen, in violation of California Civil Code Sections 3439.04, 3439.06 and 3439.07, and shall be set aside.

8. Elmer and Joan Thomassen are jointly and severally liable to the United States of America for unpaid federal income taxes in the amount of $322,041.35, plus interest, penalties, fees, and collections costs according to law.

9. Elmer Thomassen is liable to the United States of America for unpaid federal income taxes in the amount of $54,136.56, plus interest, penalties, fees, and collection costs according to law.

10. Joan Thomassen is liable to the United States of America for unpaid federal income taxes in the amount of $52,491.67, plus interest, penalties, fees, and collections costs according to law.

11. The United States of America through its agency the Internal Revenue Service has valid and subsisting federal tax liens in the amount of $428,669.58, plus penalties and interests accruing thereon and costs pertaining thereto, against each of the properties described in Exhibit "A" attached hereto.

12. Each of the properties described in Exhibit A attched hereto is subject to foreclosure or the aforementioned federal tax liens.

13. Elmer and Joan Thomassen are jointly and severally liable to the Franchise Tax Board of the State of California, in the sum of $107,378.49 as of April 3, 1979, together with interest thereon at the rate of $22.22 per day commencing on April 4, 1979.

14. Judgment shall be entered in favor of the plaintiff, United States of America, in accordance with the above findings of fact and conclusions of law.

DATED: This 8th day of June, 1979.

/s/ Manuel L. Real
UNITED STATES DISTRICT JUDGE

PRESENTED BY:

ANDREA SHERIDAN ORDIN
United States Attorney
CHARLES H. MAGNUSON
Assistant United States Attorney
Chief, Tax Division
WILLIAM J. JAMES
Assistant United States Attorney

/s/ William J. James
WILLIAM J. JAMES
Assistant United States Attorney

Attorneys for the United States of America

DESCRIPTION OF REAL PROPERTY SUBJECT TO SALE

I.

Lot 7 of Tract No. 3004, as shown on the map recorded in Book 92, pages 1 and 2 of Miscellaneous Maps, records of Orange County, California, commonly known as 1918 Dover Drive, Newport Beach, California.

II.

Lot 4 of Tract 699, as shown on the map recorded in Book 21, page 16 of Miscellaneous Maps records of Orange County, California.

III.

The north 40 feet of Lot 14 of "Mrs. Pearl F. Hollister's Subdivision of the South 4 acres of the East one-half of the Southeast quarter of Lot No. 4, in Block G of the A.B. Chapman Tract", in the City of Orange, County of Orange, State of California, as per map thereof recorded in Book 4, page 45 of Miscellaneous Maps, records of said Orange County, California.

Ex. A

IV.

Parcel 1:

All that portion of the Southwest quarter of Section 31, Township 3 South, Range 4 West, San Bernardino Base and Meridian, more particularly described as follows:

Beginning at the center quarter section corner of said Section 31;

Thence South along the North-South quarter section line of said Section 31 a distance of 663.74 feet to a point thereon;

Thence South 89 degrees 18'10" West a distance of 660.98 feet;

Thence 00 degrees 92' 45' West a distance of 664.01 feet to a point on the East-West quarter Section line of said Section 31;

Thence North 89 degrees 19' 30" East along said East West quarter section line a distance of 660.45 feet

to the point of beginning.

Said property is shown as Parcel 1 on Record of Survey recorded in Book 39 Page 95 of Records of Survey, Records of Riverside County, California.

Parcel 2:

An easement for road and public utilities purposes over, under and across the Westerly 20 feet of the Southwest quarter of the Southwest quarter and the South half of the Northwest quarter of the Southwest quarter of Section 31, Township 3 South, Range 4 West, San Bernardino Base and Meridian.

Parcel 3:

An easement for road and public utilities purposes, 20 feet wide, over, under, and across that portion of the Southwest quarter of Section 31, Township 3 South, Range 4 West, San Bernardino Base and Meridian, lying 10 feet on each side of the following described center line:

Beginning at the Southwesterly corner of the Northeast quarter of the Northeast quarter of said

Southwest quarter;

Thence Westerly to the Southeasterly corner of the North half of the Northwest quarter of said Southwest quarter;

Thence Westerly along the Southerly line of said South half to the Southwesterly corner thereof;

Parcel 4:

An easement for road and public utilities purposes, 20 feet wide, over, under and across that portion of the Northeast quarter of the Southwest quarter of Section 31, Township 3 South, Range 4 West, San Bernardino Base and Meridian, lying 10 feet on each side of the following described center line:

Beginning at the Southeasterly corner of the Northeast quarter of the Northeast quarter of said Southwest quarter;

Thence South 89 degrees 18'10" West, along the Southerly line of said Northeast quarter of the Northeast quarter of said Southwest quarter, 660.98 feet to the Southwesterly corner thereof.

Parcel 5:

An easement for road and public utilities purposes, over, under and across the Easterly 25 feet of the Southwest quarter of Section 31, Township 3 South, Range 4 West, San Bernardino Base and Meridian.

V.

That portion of the Southeast quarter of Section 18, Township 5 South, Range 4 West, San Bernardino Base and Meridian, lying Easterly of the center line of Toro Canyon Road, as shown on Record of Survey on file in Book 25 Page 10 of Records of Survey, Riverside County Records, California.

APPENDIX

MISCELLANEOUS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff/Appellee,	) CA No. 79 3562
vs.	) D.C. CV78-1731MR
ELMER THOMASSEN, et al., Defendants/Appellants)	) CENTRAL CALIFORNIA
UNITED STATES OF AMERICA Plaintiff/Appellee,	) CA No. 79-3596
vs.	) CA No. 79-3783
ELMER THOMASSEN, et al., Defendants/Appellants)	)
FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Cross-Claimant/Appellee,	) APPELLANTS') JOINT MOTION) FOR REHEARING
vs.	) WITH A
ELMER THOMASSEN, et al., Cross-Defendants/Appellants,	) SUGGESTION FOR) REHEARING EN) BANC OF) APPELLANTS') MOTION TO) RECALL THE) MANDATES

COME NOW Defendants/Appellants ELMER H. THOMASSEN, JOAN THOMASSEN, WILLIAM THOMASSEN, ROSE HORN AND GEORGE THOMASSEN (hereinafter "appellants") and move this Court for a rehearing of their motion to recall the mandate in the appeals herein, with a suggestion for rehearing en banc pursuant to Rules 35 and 40 of the

Federal Rules of Apppellate Procedure.

Appellants submit the following as facts and grounds which may have been overlooked or misapprehended by the Court in determining whether or not to grant appellants' Motion to recall the mandates which dismissed the appeals in CA Nos. 79-3562, 79-3596 and 79-3783:

1. The appeals herein concern a judgment below setting aside conveyances of five real properties of the appellants Elmer H. Thomassen and Joan Thomassen to the other appellants herein and ordering those properties to be sold to satisfy judgment liens. The value of the properties is estimated now to be between $750,000 and $1,000,000. One of the real properties is located at 1918 Dover Drive in Newport Beach, California, where Elmer H. Thomassen, Joan Thomassen, his wife, and nine of their ten children reside. Appellants Elmer H. Thomassen and Joan Thomassen dispute that they own the above mentioned properties and maintain that the conveyances to other parties should not have been set aside by the District

Court.

If the appeals herein are not recalled, the Internal Revenue Service will foreclose on five of the real properties almost immediately and the Internal Revenue Service is presently seeking an order in United States Bankruptcy Court in the Central District of California to obtain relief from the automatic stay, which stay has prevented the sale of said properties because of liens against Elmer H. Thomassen and Joan Thomassen.

2. The appeals herein are of substantial merit, are made in good faith and are not frivolous because of the numerous errors made in the record below and because of the value of the properties involved.

3. Appellants suggest that the Court consider the letter of Court Reporter John Murdock dated June 25, 1982 in its reconsideration of the Appellants' Motion to recall the mandates. (Please see copy of letter attached hereto as Exhibit "A") The appeals herein were dismissed because of failure to perfect the

appeals; however, it is suggested that the appellants' should not be penalized for errors made by the Clerk's Office of the United States District Court for the Central District of California in handling the transcripts herein. As indicated in Mr. Murdock's letter, the trial transcripts were lost somewhere between the Clerk's Office and the Ninth Circuit of the Federal Archives in Laguena Niguel. Due to the further unusual circumstances the Court reporter was unable to produce copies of the transcripts and when he did, the second day of the trial transcripts were lost again.

4. On June 3, 1982 at 4:00 p.m.the appellant Elmer H. Thomassen personally visited the office of Leonora Wallace, Supervisor of the Appeals Section of the U.S. District Court for the Central District of California, to inquire whether she had obtained the trial transcripts from the Federal Archives in Laguena Niguel, where she stated earlier they had been sent in error. Ms. Wallace stated that the Federal Archives could not locate the transcripts and then suggested that

the appellant request a search of records in the Civil Records section of the U.S. District Court. At 4:30 p.m. on June 3, 1982 Appellant Elmer H. Thomassen personally requested a record search for the transcripts. On June 4, 1982 the Civil records section informed appellant Elmer H. Thomassen that the second day of the trail transcripts were nowhere to be found.

5. Subsequent to being informed by the United States District Court Clerk that the transcript for the second day of trial, March 14, 1979 was lost, appellant Elmer H. Thomassen requested the Court Reporter John Murdock to attempt to retranscribe the proceedings on March 14, 1979. Mr. Murdock found his old notes and retranscribed the transcript of the proceedings for March 14, 1979 and re-submitted the transcript to the U.S. District Court on June 25, 1982. This filing was the third original transcript filed with the U.S. District Court for that particular date of trial. The Clerk of the U.S. District Court promptly filed a Certificate of Record on June 25, 1982 and promised to

send it to the Ninth Circuit Court of Appeals immediately together with the re-submitted transcript. (Please see Exhibit "B").

6. The Appellants wish to bring to the attention of the Court that Court Reporter Florence Carcia's ex parte communications to the Ninth Circuit Suggesting dismissal of the appellants' appeals was completely improper, unethical, unprofessional and inexcusable. (Please see Motion for Extension of Time attached hereto as Exhibit"C") Ms. Carcia's Motion for extension of time is contradictory because while she designated it Motion for extension of time, it was a Motion to dismiss by the addition of her note. In effect, she made a motion to dismiss the appellants' appeals without even sending a copy to the appellants and the motion was actually an ex parte application. Immediately after that motion with the note was filed in the Ninth Circuit, the Ninth Circuit dismissed appellants' appeals. Ms. Carcia states "this man is just trying to avoid the inevitable and his appeal should be

dismissed. If it has been dismissed, thanks for notifying the reporter." This statement by Ms. Carcia amounts to a judgment made by her as to the merit of the appeals, which Ms. Carcia has no right to do and the Court should in no way consider in its determination of whether or not the appeals should be dismissed. In Ms. Carcia's motion, she stated that she contacted Elmer Thomassen's office on several occasions; however, she failed to state that she never followed up any phone calls with written confirmation, nor did she ever notify the appellants in writing that she required additional fees for her services. Appellant never did get notification from his office of Ms. Carcia's alleged requests for payment — if she had notified him personally appellant Elmer H. Thomassen would have paid for the transcripts immediately because he wanted his appeal perfected. Please see letter of Mr. Murdock attached hereto as Exhibit "A" which states that Mr. Murdock, the main court reporter in the case, never had any problem of receiving payment for his services. of receiving payment for his services

7. Appellants' further request that the Court

consider the fact that the appellants Elmer H. Thomassen and Joan Thomassen who have been paying for the appeal and are the main motivators of the appeal have been under extreme pressure during the past two years and because of circumstances leading to that pressure, the appellants request the Court to excuse any neglect or inadvertance that may have been caused by the appellants in not perfecting the appeals. Those circumstances are as follows:

a. The appellant Elmer H. Thomassen is an orthopedic surgeon which required him to put in long hours of surgery in several hospitals and requires him to schedule his office hours in the evenings and Saturdays.

b. In 1980 the Board of Medical Quality Assurance of the State of California started proceedings against the appellant Elmer H. Thomassen to take away his medical license which proceedings lasted about a year, ending in a trial in the early part of 1981 and subsequent probation. The probation which ran from May 1981 to May 1982 required the appellant Elmer H. Thomassen to submit numerous reports to the

Board of Medical Quality Assurance, give volunteer free medical services for the year of his probation, attend numerous interviews and attend Continuing Medical Education courses, all in addition to his busy medical practice. Appellants probation ended May 25, 1982. This permits the appellant to devote more time to the appeal.

c. During the pendency of the appeal herein on January 30, 1980, the appellant Elmer H. Thomassen and his wife, appellant Joan Thomassen, in Bankruptcy Court under Chapter 11 because of the financial consequences of the trial court judgment below and because of the appellant's decreasing financial situation and inability to spend full time practicing medicine. The Chapter 11 proceeding required ever more of the time and energies of the appellants Joan Thomassen and Elmer H. Thomassen because of all of the reporting requirements of the Local Rules for the Central District of California and because of the appellants' endeavors to reorganize.

8. Now that the appeals herein are perfected

and the Certificate of Record is filed as of June 25, 1982, appellants submit that the Court should exercise its discretion and equity powers to grant the appellants a rehearing of their Motion to Recall the mandates and to order a recall of the mandates. If the appeals are recalled, the appellants will endeavor to submit their appellants' opening brief timely within the 40 days allowed for submitting opening briefs.

9. Appellants further request that the Court consider that the Law abhors default and generally desires that every person have his "day in Court". If the mandates in the appeals herein are not recalled the appellants will be denied their day in Court and denied a fair hearing in the court below because of technical delays which were beyond their control.

WHEREFORE, appellants respectfully request that this Court enter an order

1. granting a rehearing of the appellants' Motion to Recall the Mandates which dismissed the Appeals in 79-3562, 79-3596 and 79-3783 with a

suggestion for a rehearing en banc;

2. recalling the mandate of May 4, 1982 dismissing the Appeals No. 79-3596 and 79-3783 and recalling the mandate of April 30, 1981 dismissing the Appeal No. 79-3562 and to reinstate said appeals, or, in the alternative, to recall only the Mandate of May 4, 1982 and reinstate appeals No. 79-3596 and 79-3783.

Respectfully submitted,

/s/ E. H. Thomassen
Elmer H. Thomassen, pro se

/s/ George Thomassen
George Thomassen, pro se

/s/ Joan Thomassen
Joan Thomassen, pro se

/s/ Rose S. Horn
Rose S. Horn, pro se

/s/ William Thomassen
William Thomassen, pro se

DECLARATION

I, Elmer H. Thomassen, state as follows:

1. I submit this declaration in support of the appellants' Joint Motion for a Rehearing with a suggestion for Rehearing en Banc of Appellants' Motion to Recall the Mandates.

2. I am one of the appellants herein.

3. I am an orthopedic surgeon.

4. On June 3, 1982 at 4:00 p.m. I personally visited the office of Leonora Wallace, Supervisor of Appeals of the U.S. District Court for the Central District of California, to inquire whether she had obtained the trail transcripts from the Federal Archives in Laguena Niguel, where she stated earlier they had been sent in error. Ms. Wallace stated that the Federal Archives could not locate the transcripts and then suggested that the appellant request a search of the records in the Civil Records section of the U.S. District Court. At 4:30 p.m. on June 3, 1982 Appellant Elmer H.

Thomassen personally requested a record search for the transcripts. On June 4, 1982 the Civil records section informed appellant Elmer H. Thomassen that the second day of the trial transcripts where nowhere to be found.

5. Subsequent to being informed by the United States District Court Clerk that the transcript for the second day of trial, March 14, 1979 was lost, appellant Elmer H. Thomassen requested the Court Reporter John Murdock to attempt to retranscribe the proceedings on May 14, 1979. Mr. Murdock found his old notes and retranscribed the transcript of the proceedings for March 14, 1979 and re-submitted the transcript to the U.S. District Court on June 25, 1982. This filing was the third original transcript filed with ther U.S. District Court for that particular date of trial. The Clerk of the U.S. District Court promptly filed a Certificate of Record on June 25, 1982 and promised to send it to the Ninth Circuit Court of Appeals immediately together with the re-submitted transcript.

6. I never was notified personally by Ms.

Florence Carcia, Court Reporter, either on the phone or in writing that there was a balance due for her services in transcribing the transcripts for the appeal herein. If she spoke with someone in my office, the message was not conveyed to me.

7. The pressures and circumstances present during the last two years as enumerated in paragraph 7 of the Motion for rehearing are true and correct.

8. I would estimate the value of the properties which are the subject of the appeal herein as being somewhere between $750,000 to $1,000,000 in market value.

9. The appeals herein are made in good faith and have substantial merit and are not frivolous.

10. One of the real properties which are the subject matter of the appeals herein is the place of my residence at 1918 Dover Drive in Newport Beach,

California and therefore the appeal herein is of enormous importance to me and my family of 12.

I declare under penalty of perjury that the foregoing statements of fact are true and correct.

Executed in Newport Beach, California on June 25, 1982.

/s/ E. H. Thomassen
Elmer H. Thomassen, declarant

(COPY)

JOHN S. MURDOCK
Official Reporter
453 U.S. Courthouse
312 N. Spring Street
Los Angeles, Ca. 90012
(213) 687-0830 461-1229

Office of the Clerk
Ninth Circuit Court of Appeals
P.O. Box 547
7th and Mission Streets
San Francisco, Calif. 94101

June 25, 1982

Attn: Jeraldine Curtis,
Deputy Clerk
Eddie Cruz,
Deputy Clerk

Re: U.S.A. VS. ELMER THOMASSEN
CV 78-1731-R
Appeal Nos. 79-3562
79-3596
79-3783
Motion to Reconsider

I have today again filed an original transcript of the proceedings of March 14, 1979 with the appellate court clerk downstairs and have been advised that the certificate of record and transcripts will be forwarded to San Francisco either this afternoon or Monday morning. I am setting forth that fact and others which

follow, not only because of the urgency of the matter but also because they may not have come to your attention previously in writing and perhaps should be considered in connection with a Motion for Reconsideration of the Denial of Recall of Mandate dismissing the above appeal which Dr. Thomassen has advised me will be filed on or before the 29th of June, which is next Tuesday.

LOSS OF TRANSCRIPTS: On September 19, 1979 transcripts of the trial, covering March 13 and 14, 1979 were filed with the appellate court clerk downstairs. Those transcripts were ready for filing several months prior to that time, but were held up by me awaiting word from appellant to proceed with their filing. Subsequent to September 19, 1979 those transcripts were either lost in transit between the clerk's office in Los Angeles and the appellate clerk's office in San Francisco, were misplaced or misfiled in Laguena Niguel.

Upon being advised of this I endeavored to get the U.S.

Attorney's copy to avoid having to retranscribe the proceedings. I was advised that the U.S. Attorney's copy was forwarded to Washington D.C. I called Washington, D.C. several times and was advised that they could not locate their copy.

My master copy was removed from my office by the GSA along with many other documents, without notice to me, in the process of painting the office. I was indeed surprised to walk in my office and find nothing there but desks and chairs. To this date I have never been able to locate all of the boxes of documents and the GSA office has no record of where they were taken. Thus it became necessary for me to set aside a GREAT backlog of work and retranscribe the proceedings from my original notes, which fortunately were not with any of the documents removed.

Further, I understand from Dr. Thomassen that there has been some confusion with respect to transcripts prepared pretrial and post-trial by another reporter as

to payment therefor. Perhaps this misunderstanding was due to the fact that I did not ask Dr. Thomassen for payment in advance of preparation of transcripts, and at no time have I ever had any difficulty in receiving payment or in making contact with him. I have no doubt that he assumed that he would be accorded this same treatment by other reporters, that all he had to do was order the transcript and pay for it when he received it, which is not an out- of-the-ordinary presumption on the part of the general public. As a matter of fact, in my many years of reporting experience I have found it to be the usual presumption not only by members of the general public and parties appearing in pro per, but a great many lawyers, some of whom consider it an affront to their integrity if you ask for a check in advance.

It is unfortunate that so many unfortunate but understandable errors have been made procedurally in this case, and apparently the appeal has been dismissed based on technicalities, the very most significant of

which was not the fault of Dr. Thomassen if my understanding is correct that it was because the record on appeal was not perfected.

If I can be of any further help, please call.

Respectfully submitted,

/s/ John S. Murdock
John S. Murdock

SEE ATTACHED COPY OF CERTIFICATE OF RECORD.

(COPY)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ELMER THOMASSEN, Defendant-Appellant.	)Court of Appeals)Docket No. 79-3583))Docket Number (s) of)Court of Appeals)Companion and/or)cross appeals (if)known) - - - - - - - -)District Court)Docket Number)CV 78-1731-R))Date Transcript (s))Filed 6/25/82

CERTIFICATE OF RECORD

This certificate is submitted in conformance with Rule 4 (f) of the Local Rules of the U.S. Court of Appeals for the Ninth Circuit. The record on appeal, consisting of trial transcript (if any) and the trial court clerk's record, is ready for the purposes of the appeal. This record is available in the office of the U.S. District Clerk identified below.

The documents comprising the trial court clerk's

record have been numbered in conformance with Rule 11 (b) of the Federal Rules of Appellate Procedure. These document numbers are reflected on the U.S. District Court docket sheet and should be used for reference purposes in the briefs.

The actual filing date for this document in the U.S. Court of Appeals will initiate the briefing schedule in civil cases (including habeas corpus cases). All parties in civil cases will receive separate notification of this filing date. In criminal cases, the briefing schedule is set by a Time Schedule Order from the U.S. Court of Appeals.

EDWARD M. KRITZMAN
Clerk, U.S. District Court
For the Central of
California

By: /s/ A. Miyagishima
Deputy Clerk

Date: 6/25/82

cc. Counsel of Record

(COPY)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Post Office Box 547, San Francisco, CA 94101

Received
Phillip B. Winberry
Clerk, U.S. Court
of Appeals
Apr 23 1982

U. S. Court of Appeals No. : 79-3596, 79-3783

Short Case Title : U.S. vs. Thomassen

District Court No. : 78-1731

District Court Judge : Real

MOTION FOR EXTENSION OF TIME TO
FILE TRANSCRIPT

Transcript Due Date : Sometime in "81"

No. of Pages Completed : All

Extentions Requested to : When I get paid

No. of Pages Remaining to be Transcribed: All done

AFFIDAVIT - Please explain in the space below way an extension is needed or a transcript was filed late. List other cases on appeal for which you are presently preparing transcripts.

Mr. Thomassen has not paid the $92.50 still due for the trans. I have called his office 3 times & my transcriber has called two times (over)

NAME: FLORENCE CARCIA

442 C U.S. Dist Cthse

Los Angeles, CA 90012

Court Reporter Signature /s/ C. Carcia

Date of Request 4/16/82

( ) Copy sent to party ordering transcript

(back of motion)

"This man is just trying to avoid the inevitable and his appeal should be dismissed. If is has been dismissed thanks for notifying the reporter." Ex. C

Office-Supreme Court, U.S.
FILED
FEB 18 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-974

In the Supreme Court of the United States

OCTOBER TERM, 1982

ELMER H. THOMASSEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

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Rules:

9th Cir. R.:

Rule 4(c) 3, 4

Rule 4(f) 3

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-974

ELMER H. THOMASSEN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek review of the court of appeals' denial of their motion to recall the mandates in three related appeals arising out of a tax collection suit against petitioners Elmer and Joan Thomassen. The court of appeals dismissed the appeals for failure to prosecute.

The pertinent facts are as follows: The United States brought this action in the United States District Court for the Central District of California to reduce to judgment tax assessments in the amount of $428,669.58 against petitioners Elmer and Joan Thomassen, to set aside as fraudulent certain conveyances of real property by them to the other three petitioners (all of whom are close relatives of Elmer and Joan Thomassen), and to foreclose federal tax liens

against the properties in question (Pet. App. A-12, A-32). All petitioners other than George Thomassen (Elmer's brother) defaulted before the district court (*id.* at A-40). That court found that Elmer Thomassen is an orthopedic surgeon; that he and his wife Joan incurred substantial liabilities for unpaid federal income taxes in each of the years 1965-1971; that several substantial medical malpractice lawsuits were filed against Elmer Thomassen during the period 1970-1972; that one of those lawsuits resulted in a 1973 judgment against Elmer Thomassen in the amount of $50,000; that Elmer and Joan Thomassen made five conveyances of real property in 1972 to the other three petitioners, all of which "lacked any economic reality" and were fraudulent as to creditors under state law; that petitioner Elmer Thomassen between 1969 and 1972 placed various personal and business assets under the names of third parties and transferred funds to a bank account in Switzerland; and that Elmer and Joan Thomassen were also liable for California state taxes and interest in the amount of $107,378.49 as of April 3, 1979 (*id.* at A-33 to A-44). Accordingly, the district court entered judgment, holding Elmer and Joan Thomassen liable to the United States in the amount of $428,197.03 as of June 4, 1979; setting aside the conveyances in question; foreclosing federal tax liens against the real property in question; and providing for the sale of the properties and distribution of the sale proceeds (*id.* at A-12 to A-25).

Petitioners thereafter filed three separate appeals from the judgment, designated by the court of appeals as Nos. 79-3596 and 79-3783 (consolidated by the court of appeals), and No. 79-3562 (Pet. App. A-5, A-9). With respect to No. 79-3562, the clerk of the court of appeals, on March 3, 1980, informed John Matonis, counsel for the sole appellant, George Thomassen, that he had failed to timely designate and order a trial transcript as required by local rules, and

warned him that his continued failure to do this could cause the appeal to be dismissed for want of prosecution (Pet. App. A-9; App. A, *infra*, 1a-2a). Nearly eight months later, on November 4, 1980, the court of appeals granted George Thomassen an extension to November 25, 1980, to have the district court file the certificate of record for that appeal (App. B, *infra*, 5a).[1] As of April 30, 1981, more than five months after expiration of the extension, the certificate of record had still not been filed. Accordingly, on that date, the court of appeals dismissed No. 79-3562 for failure to prosecute the appeal (Pet. App. A-9).

With respect to Nos. 79-3596 and 79-3783, petitioner Elmer Thomassen filed a motion with the court of appeals to proceed on appeal in forma pauperis in order to have the transcripts ordered at government expense. The court of appeals denied the motion on August 25, 1981, and petitioners were ordered to arrange with the district court for the filing of the certificates of record in these appeals within 21 days (Pet. App. A-7). More than seven months after the expiration of the 21-day period, on May 4, 1982, the court of appeals dismissed these appeals for failure to process them to hearing (Pet. App. A-5 to A-6).

Petitioners moved to recall the mandates of the court of appeals in all three appeals, urging that any failure to process the appeals was the result of errors committed by the district court and its court reporters (Pet. App. A-53 to A-58). The court of appeals denied the motion on June 15,

---

[1]Under the rules of the court of appeals, the filing of the certificate of record by the trial court clerk with the clerk of the court of appeals indicates that the record is ready for the purposes of appeal. This certificate, however, cannot be filed until the trial court clerk receives either the trial transcript or formal notice that no trial transcript will be ordered. See Rule 4(f), Rules of the Ninth Circuit. The appellants are responsible for ordering the trial transcript. Rule 4(c). Here, petitioners were the appellants in all three appeals.

1982 (Pet. App. A-4). Petitioners filed a petition for rehearing of their motion to recall the mandates, with a suggestion for rehearing en banc (Pet. App. A-52 to A-73). On August 20, 1982, the court denied the petition (*id.* at A-2).

Although an appellate court has within its discretion the inherent power to recall its mandates, there "must be special reason, 'exceptional circumstances,' in order to override the strong policy of repose, that there be an end to litigation." *Greater Boston Television Corp.* v. *FCC*, 463 F.2d 268, 278 (D.C. Cir. 1971), citing *Hines* v. *Royal Indemnity Co.*, 253 F.2d 111, 114 (6th Cir. 1958). See also *Powers* v. *Bethlehem Steel Corp.*, 483 F.2d 963 (1st Cir. 1973). Petitioners have shown no cause whatsoever, much less "exceptional circumstances," that would justify such extraordinary relief, or show an abuse of discretion by the court of appeals. The basis for their petition to this Court, and their motion to recall the mandates below, is a letter from a court reporter, John Murdock, stating that the trial transcript was deposited with the district court on September 19, 1979, and subsequently lost or misplaced by the clerk of that court (Pet. App. A-68). This letter, however, does not justify petitioners' delay. Murdock's trial transcript was one of three transcripts that had to be filed before the appeals could proceed. The others were transcripts of pre-trial and post-trial hearings recorded by reporter Florence Carcia (Pet. App. A-68 to A-69). These pre-trial and post-trial transcripts concededly never were filed because petitioners never paid for their reproduction, as required by Rule 4(c) of the Ninth Circuit Rules (Pet. App. A-74 to A-75). Until the other two transcripts were filed, the district court clerk could not transmit the certificates of record; and it is not material (but perhaps understandable, in view of the petitioners' admittedly extended delay in prosecuting the appeals) that the filed transcript might have been temporarily misplaced in the interim. At all events, the letter does not

establish a causal link between the alleged loss or misplacing of the trial transcript and the failure to prosecute the appeals. What is more, petitioners' long delay in offering any excuse remains unexplained, and of itself constitutes flagrant disregard of the court's processes.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

FEBRUARY 1983

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[2]Petitioners also complain of "ex parte prejudicial communications from the District Court" (Pet. i, 20). These "communications" are a single notation by Carcia, the court reporter responsible for the pre-trial and post-trial transcripts, on a court form in which she explained why the transcripts had not been filed. She stated that petitioner Elmer Thomassen had not paid the $92.50 due for the transcripts, despite her efforts to reach him, and added that "[t]his man is just trying to avoid the inevitable and his appeal should be dismissed" (Pet. App. ~~76a~~ A-75). The notation merely reflected an earlier statement by the trial judge, contained in an order denying a motion of petitioners Elmer and Joan Thomassen (related to their efforts to have the government pay for the transcripts) as follows: "[T]his appeal is frivolous and interposed only for the purpose of delay. Defendants Elmer and Joan Thomassen were in default in the matter and were allowed appearance only as a matter of grace" (Pet. App. A-11).

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
P.O. BOX 547
SAN FRANCISCO, CALIFORNIA 94101

Los Angeles, Calif DATE: March 3, 1980

TO: John Joseph, Matonis, Esq.

FROM: Clerk's Office, U.S. Court of Appeals for the Ninth Circuit; by: Fiona Humphrey, Deputy Clerk Tel. 556-5559

SUBJECT: Failure to Prosecute Appeal
U.S. Court of Appeals Docket Number 79-3562
Short Title *USA* v. *Elmer Thomassen, Joan Thomassen, Rose Horn* et al & *George Thomassen*
COMPANION TO: 79-3596, 79-3783

Our records indicate that you have failed to do the following in a timely manner:

[ ] Pay the U.S. Court of Appeals docket fee in this case

[x] Designate and order (including arrangements for payment) the court reporter's trial transcript

[ ] File an opening brief (including excerpt of record) in this court which meets the standards of FRAP and our Local Rules

[ ] Designate the trial court clerk's transcript

[x] _____
Motion for relief from default required.
_____
_____

Local Rule 19(b) provides:

> "When an appellant fails to timely file the record, pay the docket fee, file a brief, or otherwise comply with the rules requiring processing the appeal to hearing, the clerk will enter an order dismissing the appeal. The clerk will notify each appellant in writing of this provision of the rules."

Unless, within fourteen days from the date of this letter, the above referenced deficiencies are corrected, this appeal may be subject to immediate dismissal under Rule 19(b) of the Local Rules of the Ninth Circuit. If you are in default due to the untimeliness of filing a brief, you must also submit a "motion for leave to file a late brief." This office is of course not at liberty to predict how the court will act upon such a motion.

cc: Court Reporter: Florence Carcia
Counsel for Aple: William James, Ass't U.S. Atty
CA9-009 (10/24/79)

M. Carr Ferguson,
Asst. Atty. Gen.
Tax Division
U.S. Department of Justice
Washington, D.C. 20530

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nov 4 1980

Richard H. Deane
Clerk, U.S. Court of Appeals

United States of America,	)	No. 79-3562
Plaintiff-Appellee,	)	DC# CV 78-1731 MLR Central California
vs.	)	
ELMER THOMASSEN, JOAN THOMASSEN, ROSE HORN, et al., Defendants,	)	
and		
GEORGE W. THOMASSEN,		ORDER
Defendant-Appellant.	)	

Before: ANDERSON and TANG, Circuit Judges

Upon due consideration of appellants' petition and suggestion, the Court issues the following order:

a) the petition for rehearing is denied;

b) the suggestion for rehearing en banc is rejected;

c) appellants are granted an extension of time of twenty-one (21) days from the entry of this order in which to have the certificate of record filed; and

d) appellants' brief shall be filed within forty-two (42) days of the entry of this order.

Mo Cal [8/4/80]